No. 13,286

United States Court of Appeals

For the Ninth Circuit

HASTORF-NETTLES, INC. and UNITED PACIFIC INSURANCE COMPANY,
Appellants,

vs.

WARREN H. PILLSBURY, Deputy Commissioner for the Thirteenth Compensation District under the Longshoremen's and Harbor Workers' Compensation Act and the Defense Bases Act and CECIL VOGEL,
Appellees.

Appeal from the United States District Court, Northern District of California, Southern Division.

BRIEF FOR APPELLEE PILLSBURY.

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STATEMENT OF CASE.

This is an appeal from an order and judgment of the United States District Court for the Northern District of California, Southern Division, Honorable Oliver J. Carter, District Judge, confirming a compensation order filed August 17, 1951 by Deputy Commissioner Warren H. Pillsbury, one of the appellees herein, in which he awarded compensation to Cecil Vogel on account of an injury sustained on September

4, 1950 while employed by appellant, Hastorf-Nettles, Inc. in the Territory of Alaska. The liability of such employer was insured by the appellant, United Pacific Insurance Company. The said compensation order was issued pursuant to the provisions of the Longshoremen's and Harbor Workers' Act of March 4, 1927, 44 Stat. 1424, 33 U. S. C. A. sec. 901 et seq., as made applicable to employment at certain defense base areas and elsewhere by the Act of August 16, 1941, 55 Stat. 622, 42 U. S. C. A. secs. 1651-1654 hereinafter called the "Defense Bases Act."

FACTS.

In the compensation order complained of the deputy commissioner found the facts to be in part as follows:

> "That on September 4, 1950, the claimant above named was in the employ of the employer above named for the performance of service at a Defense Base and on a Public Works Contract of the United States in the Territory of Alaska in the 14th Compensation District, established under the provision of the Longshoremen's and Harbor Workers' Compensation Act as extended by said Acts of Congress of August 16, 1941 and December 2, 1942, and that the liability of the employer for compensation under said Acts was insured by United Pacific Insurance Company; that on the said date claimant was quartered by the employer at a labor camp in a military reservation near Anchorage, Alaska, which bears the name of Fort Richardson; that the employer did not provide recreational facilities for its employees at said labor camp or on said military reservation and

that recreational facilities for such employees at said places did not in fact exist; that the employer herein was a subcontractor at said time and place of one Pomeroy and Company; that said prime contractor provided the transportation by automobile for said subcontractor and its employees as needed in the course of its operation; that it was customary for Pomeroy and Company drivers, as well as drivers of other cars and trucks, to pick up and give a ride to any workman on said base, whom they might pass and who were going in the same direction, irrespective of whether such workmen were going on business or otherwise; that on the said 4th day of September, 1950, which was a holiday, Labor Day, claimant for recreation went by train from Anchorage to a fair being held at Palmer, Alaska, about forty miles away, and on leaving said fair he was given a ride from Palmer back to Fort Richardson by a Superintendent of Pomeroy and Company in a Pomeroy Company truck which the latter had had assigned to him; that said truck met with an accident within the confines of Fort Richardson, in which claimant sustained the injuries which form the basis of the present claim for compensation; that the situs of said accident was on the main highway from Palmer through Fort Richardson to Anchorage, between the place where claimant performed his work and the labor camp where he was housed, and two or three miles before reaching the latter; that therefore claimant's injury arose out of and in the course of his employment with the employer herein;"

The claim for compensation which was filed by Vogel was controverted by the employer and insur-

ance carrier on the ground that the injury did not arise out of and in the course of employment. Both sides offered evidence at a hearing before the deputy commissioner on December 18, 1950 with respect to the issue controverted, and, upon the evidence adduced before him, the deputy commissioner, on August 17, 1951, issued the compensation order complained of whereby he awarded compensation to the injured employee.

The employer and carrier thereupon instituted a proceeding in the Court below to review the compensation order pursuant to the provisions of Section 21(b) of the Longshoremen's Act, 33 U. S. C. A. 921(b). A motion to dismiss the complaint was filed on behalf of the deputy commissioner. The case came on for hearing before the district judge, who, by order entered January 29, 1952, granted the motion and, by judgment dated January 30, 1952, dismissed the complaint. The present appeal by the employer and its insurance carrier is from said order and judgment.

ARGUMENT.

I.

THE DISTRICT COURT CORRECTLY DISMISSED THE COMPLAINT SINCE THE RECORD VIEWED AS A WHOLE SUPPORTS A FINDING THAT VOGEL'S INJURY AROSE OUT OF AND IN THE COURSE OF HIS EMPLOYMENT.

A. Applicable Principles of Compensation Law.

General Principles.

The burden is on the plaintiff to show that the evidence before the deputy commissioner does not support the compensation order complained of in the bill: *Grant v. Marshall, Deputy Commissioner,* 56 F. (2d) 654 (Wash. 1931); *United Employees Casualty Co. v. Summerour,* 151 S.W. (2d) 247 (Tex. 1941); *Nelson v. Marshall, Deputy Commissioner,* 56 F. (2d) 654 (Wash. 1931); *Gulf Oil Corporation v. McManigal, Deputy Commissioner,* 49 F. Supp. 75 (W. Va. 1943); *Southern Stevedoring Co. v. Henderson, Deputy Commissioner,* 175 F. (2d) 863 (C.A. 5, 1949).

The findings of fact of the deputy commissioner supported by evidence on the record considered as a whole should be regarded as final and conclusive and not subject to judicial review: *O'Leary v. Brown-Pacific-Maxon, Inc.,* 340 U.S. 504 (1951); *South Chicago Coal & Dock Co. v. Bassett, Deputy Commissioner,* 309 U.S. 251 (1940); *Del Vecchio v. Bowers,* 296 U.S. 280 (1935); *Voehl v. Indemnity Insurance Co. of North America,* 288 U.S. 162 (1933); *Crowell, Deputy Commissioner v. Benson,* 285 U.S. 22 (1932); *Jules C. L'Hote v. Crowell, Deputy Commissioner,* 286 U.S. 528 (1932), 71 C. J. 1297, sec. 1268; *Parker, Deputy Commissioner v. Motor Boat Sales Inc.,* 314

U.S. 244 (1941); *Marshall, Deputy Commissioner v. Pletz,* 317 U.S. 383 (1943); *Cardillo, Deputy Commissioner v. Liberty Mutual Insurance Company,* 330 U.S. 469 (1947).

Logical deductions and inferences which may be and are drawn by the deputy commissioner from the evidence should be taken as established facts and are not judicially reviewable: *Parker, Deputy Commissioner v. Motor Boat Sales, Inc.,* 314 U.S. 244 (1941); *Liberty Mutual Ins. Co. v. Gray, Deputy Commissioner,* 137 F. (2d) 926 (C.A. 9, 1943); *Michigan Transit Corporation v. Brown, Deputy Commissioner,* 56 F. (2d) 200 (Mich. 1929); *Del Vecchio v. Bowers,* 296 U.S. 280 (1935); *Eastern Steamship Lines, Inc. v. Monahan, Deputy Commissioner,* 21 F. Supp. 535 (Me. 1937); *Grain Handling Co., Inc. v. McManigal, Deputy Commissioner,* 23 F. Supp. 748 (N.Y. 1938); *Simmons v. Marshall, Deputy Commissioner,* 94 F. (2d) 850 (C.A. 9, 1938); *Lowe, Deputy Commissioner v. Central R. Co. of New Jersey,* 113 F. (2d) 413 (C.A. 3, 1940); *Contractors, PNAB v. Pillsbury, Deputy Commissioner,* 150 F. (2d) 310 (C.A. 9, 1945); *Southern Stevedoring Co. v. Henderson, Deputy Commissioner,* 175 F. (2d) 863 (C.A. 5, 1949).

The findings of fact of the deputy commissioner are presumed to be correct: *Anderson v. Hoage, Deputy Commissioner,* 63 App. D.C. 169, 70 F. (2d) 773 (1934); *Luckenbach Steamship Co. Inc. v. Norton, Deputy Commissioner,* 96 F. (2d) 764 (C.A. 3, 1938); *Burley Welding Works, Inc. v. Lawson, Deputy Commissioner,* 141 F. (2d) 964 (C.A. 5, 1944).

Even if the evidence permits conflicting inferences, the inference drawn by the deputy commissioner is not subject to review and will not be reweighed: *C. F. Lytle Co. v. Whipple, Deputy Commissioner,* 156 F. (2d) 155 (C.A. 9, 1946); *Contractors, PNAB v. Pillsbury, Deputy Commissioner,* 150 F. (2d) 310 (C.A. 9, 1945); *South Chicago Coal & Dock Co. v. Bassett, Deputy Commissioner,* 309 U.S. 251 (1940); *Parker, Deputy Commissioner v. Motor Boat Sales, Inc.,* 314 U. S. 244 (1941); *Liberty Mutual Insurance Co. v. Gray, Deputy Commissioner,* 137 F. (2d) 926 (C.A. 9, 1943); *Lowe, Deputy Commissioner v. Central R. Co. of New Jersey,* 113 F. (2d) 413 (C.A. 3, 1940); *Henderson, Deputy Commissioner v. Pate Stevedoring Co. Inc.,* 134 F. (2d) 440 (C.A. 5, 1943); *Del Vecchio v. Bowers,* 296 U.S. 280 (1935); *Southern Stevedoring Co. v. Henderson, Deputy Commissioner,* 175 F. (2d) 863 (C.A. 5, 1949); *Delta Stevedoring Co. v. Henderson, Deputy Commissioner,* 168 F. (2d) 872 (C.A. 5, 1948).

B. The Evidence.

The record will be referred to as showing that the District Court was justified in dismissing the complaint, thereby holding in effect that there was substantial evidence in the record considered as a whole to support the deputy commissioner's finding that Vogel's injury arose out of and in the course of his employment.

Cecil Vogel, the claimant, testified in part: that he was employed as a steamfitter at Fort Richardson, Alaska on September 4, 1950; that he lived in a labor

camp at Fort Richardson five or six miles from Anchorage; that on the day of the accident (which was Labor Day) he had gone to a fair or exposition at Palmer; that the fair grounds were on the outskirts of the town of Palmer and he had returned to Palmer approximately in time to catch the train to Anchorage and at such time he met the carpenter superintendent of the Pomeroy Company; that he told this superintendent that he would have to catch his train (R-21);* that the superintendent said that he knew of a good place to eat in the vicinity of Palmer and invited the claimant to ride back to camp with him in lieu of using the train; that while en route to the camp in a pick-up truck which the superintendent was driving, and after having dined, they met with an accident (R-22); that the accident occurred within the reservation of Fort Richardson, a few miles from the labor camp where the employee and the superintendent had quarters; that the plaintiff-employer had a sub-contract from the Pomeroy Company; that claimant was continually riding in Pomeroy Company vehicles back and forth between the camp and the work site (R-23); and he also rode back and forth to work in his employer's trucks (R-24); that the quarters he occupied were furnished by the employer but there was no recreational facilities supplied at the camp for the employees; that he was assigned to the labor camp by his employer (R-25); that the name of Pomeroy's superintendent (with whom he was riding at the time of injury) was Rudolph Buhlman; that the truck the

*"R" refers to the printed Record on Appeal.

superintendent was driving belonged to the Pomeroy Company and had been assigned to the superintendent for his personal use (R-27); that the accident occurred about 10:30 or 11:00 in the evening (R-28); that the road on which the accident occurred was the same road which witness ordinarily traveled in going from the camp to the particular job site where he had been working (R-29); that the only vehicle of the plaintiff-employer which he had seen at the site of the construction work was a truck used by the plaintiff-employer's superintendent (R-30); that the accident occurred on the main road to the labor camp about two miles from the camp; i.e., on the reservation, but outside the labor camp area, which area consisted of a few blocks square in the center of the base (R-31); that in order to reach the labor camp, a person would have to proceed over the particular road and in the direction they were travelling when the accident occurred (R-32); that the road on which the accident occurred was the regular highway between Palmer and Anchorage, running through Fort Richardson (R-35); that trucks used by the Pomeroy Company to carry the employees back and forth to the jobs were driven by Pomeroy employees (R-37).

Rudolph Buhlman testified in part: that his position is superintendent for Pomeroy Company; that the truck which was involved in the accident was owned by the Pomeroy Company; that he was riding in the truck at the time of the accident (R-38); that the main road between Palmer and Anchorage runs through Fort Richardson; that the accident occurred on the main road (R-39); that he did not know

whether the trucks used by the Pomeroy Company and the plaintiff-employer were furnished by the Government or rented from the Government, but that Pomeroy truck drivers operated them; that every night certain employees went in pick-up trucks to the office in Anchorage in order to work and they were allowed to pick up other workmen; that on the day of the accident he had met the claimant in Palmer and asked him to go along (R-40); that before returning they had gone to a place above Palmer to eat; that he had proceeded to Palmer from the labor camp in the pick-up truck that day; that he had not sought permission to use the truck, since "they generally let you use them to go around" (R-41); that it was customary in driving to or from town to pick up other workmen and "everybody did it"; that the truck he was driving on the day of the accident was assigned to him full time; that there were no limitations placed upon him in respect to picking up employees who worked at the base; that he had been working on that job since July 10th or 11th and had worked for the Pomeroy Company for about five years (R-42); that the plaintiff-employer had only one pick-up truck of its own and that the Pomeroy Company carried the employees of the plaintiff-employer back and forth to work (R-42, 43); that the accident occurred within Fort Richardson after they had passed the gate (R-43); that he had had the use of the truck for about two months, kept the key and did not have to check in or out; that the company furnished the gasoline for the truck (R-43, 44); that when they gave him the truck no limitations were placed on him as

to where he could go, who could ride with him, or who could drive the car (R-44); that since it was customary to pick up workers "nobody ever walked" (R-46).

The record thus shows that the claimant was injured while returning to the labor camp of the plaintiff-employer. In this connection, it might be helpful briefly to review the history of "going and coming" rule as applied by the Courts.

In the beginning, when compensation laws were first enacted, the Courts strictly and literally construed the phrase "arising out of and in the course of employment" and no injury was considered compensable unless it arose during the actual working hours and while the employee was actually at work. The Courts, however, began to realize that such a strict construction of the law did not tend to achieve the purpose and intent of compensation laws. Gradually the Courts came to the conclusion that an employee might still be "employed" even though his physical or manual work had ceased for the time being or had not begun and that the mere fact that an injury befell the employee at a moment when he was not performing manual labor for his employer did not necessarily mean that the accident did not arise out of or in the course of the employment. In the case of *Voehl v. Indemnity Insurance Company,* 288 U.S. 162, 169, the Supreme Court said:

> "The general rule is that injury sustained by employees when going to or returning from their regular place of work are not deemed to arise out of and in the course of their employment.

> Ordinarily the hazards they encounter in such journeys are not incident to the employer's business. But this general rule is subject to exceptions which depend upon the nature and circumstance of the particular employment. 'No exact formula can be laid down which will automatically solve every case.' *Cudahy Packing Co. v. Paramore,* 263 U.S. 418, 424. See, also, *Bountiful Brick Co. v. Giles,* 276 U.S. 154, 158. While service on regular hours at a stated place generally begins at that place, there is always room for agreement by which the service may be taken to begin earlier or elsewhere. Service in extra hours or on special errands has an element of distinction which the employer may recognize by agreeing that such service shall commence when the employee leaves his home on the duty assigned to him and shall continue until his return. And agreement to that effect may be either express or be shown by the course of business. In such case the hazards of the journey may properly be regarded as hazards of the service and hence within the purview of the Compensation Act."

In the *Voehl* case, the Supreme Court specifically held that the deputy commissioner's findings of fact on the question whether the employee's injury arose out of and in the course of his employment should be regarded as final and conclusive where supported by evidence. There is a long line of decisions holding that under certain circumstances an injury sustained before or after working hours while the employee was going to or coming from the locus or scene of his work may arise out of and in the course of employment. *Swanson v. Latham and Crane,* 90 Conn. 87, 101 A.

492 (1917); *Larke v. Hancock Mutual Life Insurance Co.,* 90 Conn. 303, 97 A. 320 (1916), L.R.A. 1916E 584; *Cudahy Packing Co. v. Industrial Commission of Utah,* 60 Utah 161, 207 Pac. 148 (1922), 28 A.L.R. 1394; *Lumbermen's Reciprocal Association v. Behnken,* 112 Texas 103, 246 S.W. 72 (1922) 28 A.L.R. 1402; *Lamm v. Silver Falls Indemnity Co.,* 133 Or. 468, 286 Pac. 527 (1930); *Littler v. Fuller Co.,* 223 N.Y. 369, 119 N.E. 554 (1918); *Donovan's* case, 217 Mass. 76, 104 N.E. 431 (1914); *Creme v. Guest,* 1 K.B. 469.

The question of entitlement to compensation for injuries sustained outside the working hours arises most frequently where the employee is being transported to and from work. What are the circumstances which would permit a finding that an injury sustained by an employee on his way to or from work arose out of and in the course of his employment? As was stated in the *Voehl* case, *supra,* "no exact formula can be laid down which will automatically solve every case." But a brief review of recent cases involving that question will indicate the circumstances and factors which the Courts considered important.

In *Smith v. Industrial Accident Commission,* 18 Cal. (2d) 843, 118 P. (2d) 6 (1941), the employee was working on Treasure Island which was the site of the World's Fair at San Francisco. At the end of the day's work he got on a truck owned by the employer and rode along the roads of the exposition towards the terminal where he was to board a boat; on the way he was injured. The Court held that the

custom of the employees to ride this truck, coupled with the fact that the roads traveled were part of the employer's premises, were important facts to be considered in connection with the question whether the employee left the employment when he boarded the truck. The Court held that when transportation is furnished by the employer to convey a workman to and from his place of work *as an incident of the employment,* an injury sustained during tranportation *arises out of and in the course of employment.*

In the case of *Southern States Mfg. Co. v. Wright,* 146 Fla. 29, 200 So. 375 (Fla. 1941), the employee was injured while being transported in a truck of the employer to the place of employment. The injury occurred prior to working time and during a period for which the employee was not being paid. In affirming an award of compensation the Court (p. 376) said:

> "Generally it appears that the employer's liability in such cases depends upon whether or not there is a contract between the employer and employee, express or implied, covering the matter of transportation to and from work.
>
> "* * * So, in this case where the employer required the services of the employee in its milling plant at Bonifay, and *as an incident to procuring such services there,* arranged for the transportation of the employee on the employer's truck to and from Marianna, the place where the employee lived, to and from Bonifay, there existed an implied, if not expressed, contract that the employer would provide such truck for such trans-

portation and that the employee would use such truck for such transportation under whatever terms were agreed upon. Such transportation so had, received and used was an *incident to the employment and was* exercised in the furtherance of the employment." (Emphasis supplied.)

In the case of *Fritzmeier v. Texas Employers' Ins. Assn.,* 131 Tex. 165, 114 S.W. (2d) 236 (1937), the employee was hired as a tank builder on a job several miles distant from Gladewater. He did not live where the work was being performed. The employee resided at Gladewater, and rode each morning and back each evening with a truck driver in charge of the truck being used on the job. The employee and others were instructed to meet at a designated place at Gladewater in order to ride the truck and reach work on time. Fritzmeier was injured while en route to the place of work.

The Court affirmed an award of compensation under the foregoing facts, stating that the transportation was connected with the employment and that, even though the employer had not assumed the obligation of transporting the employee and his co-laborers, *yet it knew of the arrangement followed and plainly recognized the necessity of the method of transportation.*

In the case of *Lee v. Fish,* 196 A. 662 (N.J. 1938), decedent was in the employ of the respondent as a helper in his business as wholesale grocer. On the day in question, as was his custom, he went upon the truck of his employer preparatory to being taken

home after the course of the day's business. The truck was operated by the respondent's brother, who was the manager of the respondent's business. Decedent lived on the route between the employer's place of business and the garage where the truck was nightly stored. It was the custom of the employer, through his brother, to go for the decedent regularly on Sundays and take him to the respondent's place of business in order to aid the respondent in opening his business on time; this with the knowledge and acquiescence of the employer over a long period of time. Affirming an award of compensation made for fatal injuries sustained by deceased en route home, the Court (p. 662) said:

> "I am satisfied that the *furnishing of the said transportation by the employer was grounded in the mutual convenience and advantage of both the employer and employee. They engaged in this practice until the same ripened into custom.* It is clear that the *furnishing of the said transportation was for the benefit of both parties.* I feel that the same comes clearly within the rule established and so well expressed in the cases of *Rubeo v. McMullen Co.,* 117 N.J.L. 574, 189 A. 662; Id., 118 N.J.L. 530, 193 A. 797; *Salomone v. Ansetta,* N.J. Sup., 194 A. 798, and *Alberta Contracting Corporation v. Santomassimo,* 107 N.J.L. 7, 150 A. 830:
>
> > "'*The relation of employer and employee continues while the employee is riding to and from his employer's premises, in a truck used in connection with his employer's work,* by direction of his employer, with his knowledge

> and acquiescence in the continued practice, which was beneficial to both the employer and the employee; and an injury sustained while so riding arises out of and in the course of his employment.' Alberta Contracting Corporation v. Santomassimo, supra." (Emphasis supplied.)

In the case of *Taylor v. M. A. Gammino Construction Co.,* 127 Conn. 528, 18 A. (2d) 400 (1941), the employee worked until an early hour in the morning on an emergency job and was authorized by the boss to use a truck to ride home in. The next day the emergency continued and the employee took the same truck home although he was not given special permission on that occasion. He was injured on the way home. The Court in affirming the award of compensation (p. 401) said:

> "An employer may by his dealing with an employee or employees annex to the actual performance of the work, as *an incident of the employment, the going to or departure from the work;* to do this it is not necessary that the employer should authorize the use of a particular means or method, although that element, if present, is important; it is enough if it is one which, from his knowledge of and acquiescence in it, can be held to be *reasonably within his contemplation as an incident to the employment,* particularly where it is of benefit to him in furthering that employment." (Emphasis supplied.)

In the case of *Chrysler v. Blue Arrow Transportation Lines,* 295 Mich. 606, 295 N.W. 331 (1940), the employee was engaged in driving a truck between

Grand Rapids and Chicago. At Chicago the truck was unloaded, reloaded and driven back to Grand Rapids. Whenever the truck arrived at Chicago too late on Saturday to be reloaded, the employee had the choice of staying at Chicago until Monday or of going back to Grand Rapids on another truck of the company. On the occasion in question the employee arrived at Chicago on Saturday and rode another truck back to Grand Rapids. On Sunday he boarded a truck in Grand Rapids to return to Chicago and was injured en route. The question was whether his injury was sustained in the course of his employment. The Court, affirming an award to the employee (p. 332), stated:

> "Solution of the problem in the present case is aided by the test suggested in the Konopke case, 'whether under the contract of employment, *construed in the light of all the attendant circumstances,* there is either an express or implied undertaking by the employer to provide the transportation'.
>
> "In the case before us there was a clear undertaking on the part of the employer to furnish week-end transportation between Grand Rapids and Chicago whenever the last trip of the week did not leave the driver in his home town." (Emphasis supplied.)

In the case of *Rubeo v. Arthur McMullen Co.,* 118 N.J. Law 530, 193 A. 797 (1937), the employee was hired as a skilled concrete worker to do some work on a dock which the employer was building on Staten Island, New York, some distance from his home. The evidence was in conflict as to whether the employee

was to be provided with transportation from his home to the site of the work but it was clearly shown that the superintendent regularly transported the employee to the job and back in one of the company trucks. The injury occurred on the homeward trip. In affirming an award of compensation the Court (p. 798) said:

> "When the accident happened, the essential statutory relation, in popular understanding and intent, had not been terminated. The line of delineation is not so finely drawn. The provision of transportation, if not the subject of an express or implied undertaking binding under any and all circumstances, *was plainly within the contemplation of the parties,* at the time of the making of the contract of employment, as the thing to be done when in special circumstances the common interest would therefore be subserved. But however this may be, the furnishing of this accommodation grew, with the knowledge and acquiescence, if not indeed the direction, of the employer, *into a practice grounded in mutual convenience and advantage.* The deceased employee, while not directly concerned, in the journeys to and fro, with the performance of the work for which he was employed, was yet engaged in that which, by mutual consent, was considered as incidental to the employment. It was a thing so intimately related to the particular service contracted for as to be deemed, in common parlance, a part of it. This is the legislative sense of the term 'employment'. The requisite relation of master and servant continued during the journey; and the hazards thereof are therefore regarded as reasonably incident to the service bargained for." (Emphasis supplied.)

In *Venho v. Ostrander Ry. & Timber Co.,* 185 Wash. 138, 52 P. (2d) 1267 (1936), plaintiff brought an action to recover damages for personal injuries sustained while riding a logging train from defendant's lumber camp to town. For about two weeks prior thereto, he had been employed in the woods as a "faller", but had ceased to work as such the evening before the accident, and, at the time he was injured, was on his way out from the camp to Ostrander. He alleged in his complaint that it was the *custom* of logging companies to transport employees on their logging trains to and from their camps. In order to support its contention that the sole remedy of the employee was under the compensation law, the defendant, Ostrander Railway & Timber Company, pleaded affirmatively that plaintiff was injured "in the course of his employment", and that he was entitled to relief under the workmen's compensation law. The question in the case was: Was plaintiff, at the time of his injuries, "in the course of his employment"? In deciding that he was the Court (p. 1268) said:

> "It is the general rule (to which this court adheres) that a workman injured going to or coming from the place of work is not 'in the course of his employment'. There is an exception, however, as well established as the rule itself. The exception, which is supported by overwhelming majority, is this: When a workman is so injured, while being transported in a vehicle furnished by his employer *as an incident of the employment,* he is within 'the course of his employment', as contemplated by the act. In other words, when the vehicle is supplied by the employer for *the mutual*

benefit of himself and the workman to facilitate the progress of the work, the employment begins when the workman enters the vehicle and ends when he leaves it on the termination of his labor. This exception to the rule may arise either as the result of *custom or contract, express or implied.* It may be implied from the nature and *circumstances of the employment* and the custom of the employer to furnish transportation." (Emphasis supplied.)

In the case of *Johnson v. Thompson-Sterrett Co.,* 42 Ga. App. 739, 157 S.E. 363 (1931), which involved an injury to an employee who was being transported home from work, the Court (p. 364) said:

"Where it is the *custom* of an employer to transport employees to and from work, and the employees, with the knowledge and consent of the employer, use a truck furnished or designated by the employer for this purpose, the inference is authorized that the transportation of the employees, whether expressly a part of the contract or not, is one of the incidents of the employment, and where one of the employees, while being so transported, is injured by falling or jumping from the moving truck, the inference is authorized that the injury arises out of and in the course of the employment. Daniel Donovan's Case, 217 Mass. 76, 104 N.E. 431, Ann. Cas. 1915C, 778." (Emphasis supplied.)

In the case of *Alberta Contracting Corporation v. Santomassimo,* 107 N.J. Law 7, 150 A. 830 (1930), the employee was injured while riding home on a truck from the stone quarry where he worked which was

thirteen miles from the town where he lived. *There was no express agreement that the employee should adopt that method of transportation but for several months the employees had used that method with the knowledge and acquiescence of the employer.* On an appeal from an award of compensation made in the case, the Court (p. 831) said:

> "The court below found, and we think rightly, that decedent's death arose out of and in the course of his employment. It was argued below, and is argued here, that such finding was erroneous because the decedent 'was not engaged in his employment' while on his way to work.
>
> * * * * * * *
>
> "The case at bar is one of an obligation to be implied from the conduct of the employer, and is much like the case of Sava v. Pioneer Contracting Co., 103 Conn. 559, 131 A. 394.
>
> "We believe that the pertinent rule to be extracted from the cases is this: The relation of employer and employee continues while the employee is riding to and from his employer's premises, in a truck used in connection with his employer's work, by direction of his employer, with his knowledge and acquiescence in the continued practice, which was beneficial to both the employer and employee; and an injury sustained while so riding arises out of and in the course of his employment. See Cicalese v. Lehigh Valley Railroad Co., 75 N.J. Law, 897, 69 A. 166; Depue v. Salmon Co., 92 N.J. Law, 550, 106 A. 379; Dunbaden v. Castles Ice Cream Co., 103 N.J. Law, 427, 135 A. 886; Bolos v. Trenton Fire Clay & Porcelain Co., 102 N.J. Law, 479, 133 A. 764, affirmed 103 N.J. Law, 483, 135 A. 915.
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> *"Whether the truck upon which decedent rode when injured was owned by the employer is immaterial, since the trucks were all in use in hauling stone in connection with the work, and sufficiently under the employer's control* to permit the carrying out of the arrangement for such transportation." (Emphasis supplied.)

The case of *Lamm v. Silver Falls Timber Co.,* 133 Or. 468, 286 Pac. 527 (1930) involves facts very similar to those in the instant case. It appears to be directly in point. The Court in that case analyzed and classified the various leading cases having to do with injuries sustained by employees while they are not actually working. The review is quite comprehensive. In view of the similarity of facts and the clarity of the opinion we are quoting extensively therefrom.

> "The plaintiff, after having been in the employ of the defendant for many months, engaged in logging operations, concluded to return to his home in Silverton on Saturday November 6, 1926, for a short visit; apparently he had no specific objective in mind which he had determined to accomplish during his absence from the defendant's camp. It is clear that neither he nor the defendant had any thought of terminating the plaintiff's employment, and that he expected to shortly return and resume his labors. Thus he retained his bunk house; his blankets, personal belongings, etc. remained in it at the defendant's camp, and in fact when he concluded his labors on Friday, the circumstances were no different than when he quit his work on any other day with the exception that he did not expect to resume his task the following Monday. On Tuesday, November 9th,

the plaintiff decided to return so that he could again resume his work on Wednesday morning, November 10th; such being his plan, he presented himself at the Silverton terminus of defendant's logging railroad and spoke to an employee in charge of the logging train which was about to start for the camp. He was accepted aboard the train, and in harmony with the uniform practice was charged no fare. This, together with the statement of facts contained in the previous decision which is reported in 277 P. 91, will suffice for the purpose of setting forth the relationship between the parties. It may be useful, however, to remind ourselves of a few facts concerning logging camps which are well known. Work in these camps is distinguishable from that in the factory in the important fact that the logger's employment is discharged at a place which is far removed from his home, places of recreation, and facilities for supplying his wants. * * * While the logger is staying at the camp with its bunk houses, limited boarding accommodations, and meager facilities for supplying the wants of life, he finds frequent occasion to quit work for short periods of time and visit the city. These temporary cessations from labor are due to the nature of the logging camp and the kind of work in which the men are engaged; * * *

* * * * * * *

"*From the foregoing, the conclusion seems justifiable that the plaintiff would not have been injured but for his employment. It is true that when he was injured he was not working for the defendant, but he was in its employ.* His work did not begin until the following morning; but his employment began when the defendant accepted the

plaintiff into its employ some months previously. Hence the employment continued not only while he was working for the defendant in the woods, but also upon his trip to Silverton and back.

"We come now to the more specific question whether the injury arose out of and in the course of the employment. This court, as well as other courts, has many times pointed out that the problem, whether an injury arises out of and in the course of the employment, is not to be determined by the precepts of the common law governing the relationship between master and servant; these ancient rules include the principles defining negligence, as assumption of risk, fellow-servant doctrine, contributory negligence, etc. Likewise, all courts are agreed that there should be accorded to the Workmen's Compensation Act a broad and liberal construction, that doubtful cases should be resolved in favor of compensation, and that the humane purposes which these facts seek to serve leave no room for narrow technical constructions.
* * *

"One of the purposes of the Workmen's Compensation Acts is to broaden the right of employees to compensation for injuries due to their employment. Since these acts contemplate compensation for an injury arising out of circumstances which would not afford the employee a cause of action, the right to redress is not tested by determining whether a right of action could be maintained against the employer. Stark v. State Industrial Accident Commission, 103 Or. 80, 204 P. 151. The word employment, as used in such legislation, is construed in its popular signification. We quote from the decision of the Montana

Court in *Wirta v. North Butte Mining Co.,* 64 Mont. 279, 210 P. 332, 335, 30 A.L.R. 964: 'The word "employment", as used in the Workmen's Compensation Act, does not have reference alone to actual manual or physical labor, but to the whole period of time or sphere of activities, regardless of whether the employee is actually engaged in doing the thing he was employed to do. * * * To say that plaintiff "ceased" working for the defendant is not equivalent to saying that he severed the relation of employer and employee.'

"Since the courts have recognized the broad humane purposes of the act, they have readily perceived that the mere fact that the injury befell the claimant, at a moment when he was not performing manual labor for his employer, does not necessarily prove that the accident did not arise out of or in the course of the employment. The words just mentioned which are a part of most of the acts are never qualified by the limitation that the injury must have been inflicted during regular working hours.

* * * * * * *

"Since employment is construed in its popular signification, an employee is frequently granted compensation from the fund, even though his hours of service have not yet begun, or have ended, and even though he is not upon the premises of his employer engaged in physical service of the latter.

* * * * * * *

"A careful study of the foregoing cases, as well as the ones to which reference will later be made, seems to warrant the conclusion that the courts deem that the theory of Workmen's Compensation Act is to grant compensation to an injured work-

man on account of his *status*. He is an integral part of the industry, and the latter should bear the costs of his recovery like it bears the costs incurred by the replacement of mechanical parts. When the status of an employee, that is his relationship to the industry, brings him within the zone where its hazards cause an injury to befall him, he is entitled to compensation. The courts which allowed the above recoveries, and other courts to whose decisions we shall later advert, evidently did not confine their searches to the doubtful words 'accident arising out of and in the course of his employment', but bore in mind this general purpose of the act, as revealed by its entire text.

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"The next group of cases which we shall review may be preceded by the following quotations from Wells v. Clark & Wilson Lumber Co., supra: 'Numerous authorities are cited by appellant to the effect that an employee going to or returning from his work or going to the place where he is employed to perform labor is "acting in the course of his employment", and is subject to the provisions of the Workmen's Compensation Act. This is sound law.'

"In the cases of the type adverted to by the above quotation, the employee was held entitled to the benefit of the act whenever his relationship to the industry subjected him to its hazards in a greater degree than an ordinary member of the public. It will be observed, as we proceed, that the mere fact that the morning whistle had not blown was immaterial; likewise, no controlling significance was attached to the fact, that the accident occurred upon a public street, and

that the tort-feasor was a third party. The rule expressed in Wells v. Clark & Wilson Lumber Co. is general. The cases which it suggests may be more specifically classified as follows: (1) An employee upon whom an injury is inflicted, while being conveyed to or from his work in a conveyance furnished by his employer as an incident of the contract of employment, is generally held entitled to compensation. (Citing many cases.)

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"Applying the analogy of the foregoing cases, and the principles which we have endeavored to deduce from them, the conclusion comes irresistibly that, although the plaintiff's work would not resume until Wednesday morning, the employment began several months previously and continued during the trip from Silverton. Transportation to and from plaintiff's work upon these occasional trips was *incidental to his employment; hence, the employment continued during the transportation in the same way as during the work.* The injury, occurring during transportation, took place within the period of his employment, and at a place where he had a right to be, and while he was doing something incidental to his employment, because rendered necessary by the peculiar circumstances attending upon logging operations." (Emphasis supplied.)

It will be seen from the above discussed cases that in carrying out the humane purposes and intent of compensation laws the courts have not given the phrase "course of employment" a narrow, limited, or legalistic construction, such as limiting its meaning to the hours of actual physical labor. Injuries occurring out-

side such hours have been held to be compensable being predicated upon agreement of the parties either in express terms or as shown by custom or a course of conduct. *Customary practices* are important as showing such agreement or understanding, particularly where the employer knew or should have known of the local transportation arrangements or where the necessity for the arrangements was apparent and therefore made the kind of arrangements an incident of the employment, or where the arrangements constituted a mutual convenience and advantage to the employer and employees. The Courts have viewed such arrangements as within the contemplation of the parties at the time of the making of the contract of employment, and as implied from the nature and circumstances of the employment particularly in industries wherein the work site is far removed from the employees' homes, places of recreation and facilities for supplying their wants.

The most recent case on this aspect of compensation law is *O'Leary, Deputy Commissioner v. Brown-Pacific-Maxon, Inc.,* 340 U.S. 504, decided February 26, 1951, in which the Court said that "compensation is not confined by common-law conceptions of scope of employment". In that case the workman was also employed by a Government contractor outside the continental limits of the United States. Unlike the case at bar, however, the employee in that case was *waiting for* his employer's bus to take him from a seaside recreation center (maintained by the employer for its employees). In an attempt to rescue two men standing

on a reef away from shore, he was drowned. The channel in which the drowning occurred was so dangerous that its use was forbidden for swimming purposes, and signs to that effect had been erected. Notwithstanding these facts, the Supreme Court held that the deputy commissioner's findings in support of his award of compensation "are to be accepted unless they are unsupported by substantial evidence on the record considered as a whole". In so ruling the Court reversed the Circuit Court which had concluded that "the lethal currents were not a part of the recreational facilities supplied by the employer and the swimming in them for the rescue of the unknown man was not recreation". In that case the Supreme Court (p. 508) stated:

> "We are satisfied that the record supports the Deputy Commissioner's finding. The pertinent evidence was presented by the written statements of four persons and the testimony of one witness. It is, on the whole, consistent and credible. From it the Deputy Commissioner could rationally infer that Valak acted reasonably in attempting the rescue, and that his death may fairly be attributable to the risks of the employment. We do not mean that the evidence compelled this inference; we do not suggest that had the Deputy Commissioner decided against the claimant, a court would have been justified in disturbing his conclusion. We hold only that on this record the decision of the District Court that the award should not be set aside should be sustained."

In the case at bar the claimant had "acted reasonably" (quotation is from *O'Leary* case, supra, 340 U.S.

504) in accepting the invitation of a superintendent to ride back to the labor camp with him. The more so since it had been customary to give workmen "a lift" under similar circumstances. In the words of the Supreme Court (in the same case), "the Deputy Commissioner could rationally infer that * * * [the claimant] acted reasonably in * * * [accepting the invitation], and that his * * * [injury] may fairly be attributable to the risks of the employment. * * * All that is required is that the 'obligations or conditions' of employment create the 'zone of special danger' out of which the injury arose." In the instant case the employment at an isolated location plus the need for recreation outside the camp because it was not supplied at the camp plus the custom of riding in the vehicles of the general contractor, all combined to make the injury one which arose from an incident of the employment. From the circumstances related in the evidence and the apparent lack of trucks available for transportation of plaintiff-employer's employees, furnished by it, the inference is proper and reasonable that the plaintiff-employer could not have avoided knowledge of the transportation provided principally by Pomeroy for its employees—and the necessity therefor under the circumstances. See *Liberty Mutual Insurance Company v. Gray,* 137 F. (2d) 926 (C.A. 9, 1943) where the employee, as in the instant case was returning to the work camp after a trip to town for recreation purposes.

Appellants contend that the employee was not within the coverage of the Act at the time of injury because

the automobile in which he was riding was not under the "control" of the employer. In this connection, the Supreme Court stated in *Cardillo, Deputy Commissioner v. Liberty Mutual Insurance Company,* 330 U.S. 469, 480:

> "There are no rigid legal principles to guide the Deputy Commissioner in determining whether the employer contracted to and did furnish transportation to and from work. 'No exact formula can be laid down which will automatically solve every case.' *Cudahy Packing Co. v. Parramore,* 263 U.S. 418, 424; *Voehl v. Indemnity Ins. Co., supra,* 169. Each employment relationship must be perused to discover whether the employer, by express agreement or by a course of dealing, contracted to and did furnish this type of transportation. For that reason *it was error for the Court of Appeals in this case to emphasize that the employer must have control over the acts and movements of the employee during the transportation before it can be said that an injury arose out of and in the course of employment.* The presence or absence of control is certainly a factor to be considered. But it is not decisive. An employer may in fact furnish transportation for his employees without actually controlling them during the course of the journey or at the time and place where the injury occurs. *Ward v. Cardillo, supra. And in situations where the journey is in other respects incidental to the employment,* the *absence of control* by the employer has not been held to preclude a finding that an injury arose out of and in the course of employment. See *Cudahy Packing Co. v. Parramore, supra; Voehl v. Indemnity Ins. Co., supra.*" (Emphasis supplied.)

Appellants likewise base their position upon another misconception (p. 20) namely that the furnishing of the transportation (during which the injury occurs) must have been contemplated by the contract of employment. There is no such requirement and appellants cite no authority in support thereof. It may happen that the transportation is furnished pursuant to the employment contract; in many instances however the practice develops without any express understanding or agreement; it develops from the nature and circumstances of the employment itself in which event it becomes an incident of the *employment,* not of the *employment contract.* The Supreme Court correctly used the term in the *Cardillo* case *supra* 330 U.S. 469 when it stated:

> "* * * And in situations where the journey is in other respects *incidental to the employment* * * *"

This is the usual test of causal relationship between the injury and the employment, namely the incidentalness of what the employee is doing at the time of injury to the employment. In this category are such acts as eating, smoking, getting a drink of water, seeking fresh air, going to the toilet etc., none of which are done pursuant to the employment contract but which are incidental to the employment.

In view of all of the above could it be said as a matter of law that riding on a truck of the general contractor to or from town on a week-end or holiday from an isolated labor camp in Alaska, for the pur-

pose of relaxation and recreation is not incidental to the employment, particularly where it was the custom and practice to do so?

Lamm v. Silver Falls Timber Co., supra, 133 Ore. 468, 286 P. 527 (1930);

Liberty Mutual Ins. Co. v. Gray, supra, 137 F. (2d) 926 (C.A. 9, 1943);

O'Leary v. Brown-Pacific-Maxon Inc., supra, 340 U.S. 504.

O'Leary v. Brown-Pacific-Maxon Inc., 340 U.S. 504.

Appellants have cited *Universal Camera Corporation v. N.L.R.B.,* 340 U.S. 474 as authorizing a new scope of review of administrative actions. In *O'Leary v. Brown-Pacific-Maxon, Inc.,* 340 U.S. 504, decided on the same day, which also involved judicial review of an award under the Defense Bases Act, the Court set the standard of review in the following words:

> "The standard, therefore, is that discussed in Universal Camera Corp. v. National Labor Relations Board, 340 U.S. ....., 71 S. Ct. 456. It is sufficiently described by saying that the findings are to be accepted unless they are unsupported by substantial evidence on the record considered as a whole. The District Court recognized this standard."
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> "We are satisfied that the record supports the Deputy Commissioner's finding. The pertinent evidence was presented by the written statements of four persons and the testimony of one witness.

> It is, on the whole, consistent and credible. From it the Deputy Commissioner could rationally infer that Valak acted reasonably in attempting the rescue, and that his death may fairly be attributable to the risks of the employment. We do not mean that the evidence compelled this inference; we do not suggest that had the Deputy Commissioner decided against the claimant, a court would have been justified in disturbing his conclusion. We hold only that on this record the decision of the District Court that the award should not be set aside should be sustained."

It is to be noted that the Court did not in that case indicate that the evidence will be weighed on review. In fact footnote 21 of the *Universal Camera* case indicates a contrary intention, namely not to weigh the evidence. Accord: *U. S. Fidelity and Guaranty Co. v. Britton,* 188 F. (2d) 674 which was decided after the *O'Leary* case and cited it. Cf. *Pittston Stevedoring Co. v. Willard,* 190 F. (2d) 267 also decided subsequent to the *O'Leary* case.

CONCLUSION.

In view of the above, it is respectfully submitted that the District Court properly refused to set aside the deputy commissioner's award as "unsupported by substantial evidence on the record considered as a whole", or to find that the deputy commissioner's

award was not in accordance with law. The order and judgment appealed from should be affirmed.

Dated, San Francisco, California,
June 18, 1952.

Respectfully submitted,

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